

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
DON A. **COOKSTON**)

Appearances:

For Appellant: **Don A. Cookston,**
in pro. per.

For Respondent: Carl G. Knopke
Allen R. Wildermuth
Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Don A. **Cookston** against proposed assessments of additional **personal** income tax and penalties in the total amounts of **\$17,310.72** and **\$18,587.06** for the years 1978 and 1979, respectively.

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The issue presented by this appeal is whether appellant has established error in respondent's -proposed assessments of **additional** personal income tax or **in** the penalties assessed for the years in issue.

Appellant, a building contractor, did not file **California** personal income tax returns for **the** years 1978 and 1979. When appellant failed to comply with respondent's demand that he file these returns, the subject proposed assessments were issued. Respondent based its estimation of appellant's income for 1978 upon information contained in certain building permits issued appellant by the County of Contra Costa in 1978; a 15 percent growth and inflation factor was added to that amount to arrive at appellant's 1979 income. The proposed assessments include penalties for failure to file a return, failure to file upon notice and demand, failure to pay e'stimated income tax, and negligence. In his appeal from **respondent's** action in this matter, appellant has apparently adopted the position he advanced in an earlier appeal dealing, in part, with the years 1976 and 1977 (Appeal of Don A. and Diane H. Cookston, Cal. St. Bd. of Equal., Sept. 29, 1981), i.e., that he simply is not obligated to pay personal income tax; he also asserts 'that respondent's estimation of his income is in **error**.

Respondent's determinations of tax are presumptively **correct**, and appellant bears the burden of proving them erroneous. (Appeal of K. L. Durham, Cal. St. Bd. of Equal., March 4, 1980; Appeal of Harold G. Jindrich, Cal. St. Bd. of Equal., April 6, 1977.) This rule also applies to the penalties assessed in this case. (Appeal of K. L. Durham supra; Appeal of Myron E. and Alice Z. Gire, Cal. St. Bd. of Equal., Sept. 10, 1969.) Where the taxpayer files no return and refuses to cooperate in the ascertainment of his income; respondent has great latitude in determining the amount of tax liability, and may use reasonable estimates to establish the taxpayer's income. (See, e.g., Joseph F. Giddio, 54 T.C. 1530 (1970); Norman Thomas, ¶ 80,359 P-H Memo. T.C. (1980); George Lee Kindred, ¶ 79,457 P-H Nemo. T.C. (1979).) In reaching this conclusion, the courts have invoked the rule that the failure of a party to introduce evidence which is within his control gives rise to the presumption that, if provided, it would be unfavorable. (See Joseph F. Giddio, supra, and the cases cited therein.) To hold otherwise would establish skillful **concealment** as an invincible barrier to the determination of tax liability. (Joseph F. Giddio, supra.) Since appellant has failed to provide any evidence establishing that respondent's determinations were excessive or without foundation, we must conclude that he has failed to carry **his** burden of proof.

On the basis of the evidence before us, we conclude that respondent correctly computed appellant's tax liability, and that the imposition of penalties was fully **justified**. Respondent's action in this matter will, therefore, be sustained.

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Finally, as previously noted, appellant has previously brought an appeal before this board in which he raised the same frivolous argument rejected here. (Appeal of Don A. and Diane H. Cookston, supra.) As we stated in the Appeals of Robert R. Aboltin, Jr., et al., decided on June 29, 1982, "[t]o pursue an appeal under such circumstances can only be construed as an attempt to obstruct and delay the appellate review process." We find that appellant instituted and has pursued this proceeding merely for the purpose of delay. Accordingly, pursuant to Revenue and Taxation Code section 19414, 1/ a penalty in the amount of five hundred dollars (\$500) shall be imposed against him.

1/ Section 19414 provides as follows:

Whenever it appears to the State Board of Equalization or any court of record ~~of~~ this state that proceedings before it under this part have been instituted by the taxpayer merely for delay, a penalty in an amount not in excess of five hundred dollars (\$500) shall be imposed. Any penalty so imposed shall be paid upon notice and demand from the Franchise Tax Board and shall be collected as a tax.

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O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to **section** 18595 of the Revenue and Taxation Code, that the **action** of the Franchise Tax Board on the protest of Don A. **Cookston** against proposed assessments of additional personal income tax and penalties in the total amounts of **\$17,310.72** and **\$18,587.06** for the years 1978 and 1979, respectively, be and the same is hereby sustained, and that a \$500 delay penalty under section 19414 be imposed against him and the Franchise Tax Board shall collect the same.

Done at Sacramento, California, this 3rd **day of** January , 1983, **by the State** Board of Equalization, **with** Board Members Mr. Bennett, Mr. Dronenburg and Mr. Nevins present.

William M. Bennett, Chairman

Ernest J. Dronenburg, Jr., Member

Richard Nevins, Member

_____, Member

_____, Member